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Bombay City Police Act, IV of 1902. It must also be presumed that there were good reasons for the restrictions imposed in the operation of the law which was to have force not merely in Presidency Towns but throughout the rural districts of India.

*Conviction and sentence set aside.*

R. R.

### APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.\**

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August 8.

MANCHHARAM BHIKU PATIL AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), APPELLANTS v. DATTU AND TWO OTHERS WHO WRITE BHIKU AS THEIR FATHER'S NAME (ORIGINAL PLAINTIFFS NOS. 1 TO 3), RESPONDENTS.\*

*Hindu Law—Sudras—Leva Kumbis of Changdev in the East Khandesh District, whether Sudras—Illegitimate sons dividing property with legitimate sons, mother entitled to a share.*

Leva Kumbis residing at Changdev in the East Khandesh District are Sudras.

Under Hindu law, even when, among the Sudras, the illegitimate sons divide the property with the legitimate sons, the mother is entitled to a share.

FIRST appeal against the decision of J. H. Betigiri, First Class Subordinate Judge at Dhulia, in suit No. 6 of 1914.

Suit for partition.

One Bhiku Pandu, a Patil of Changdev in the East Khandesh District, died in 1912. He left surviving him a son Mansaram, a grandson Bhagwan and a widow Bhimabai (defendants Nos. 1 to 3) and also three illegitimate sons (plaintiffs).

\* First Appeal No. 185 of 1916.

In 1914, the plaintiffs as the illegitimate sons of Bhiku, sued to recover by partition their  $\frac{3}{8}$ ths share in the properties left by Bhiku.

The defendants Nos. 1 and 2 contended that the plaintiffs were not born of the loins of Bhiku Pandu; that Bhiku was not a Sudra by caste; that he belonged to the Leva Patidar caste of Gujarat and the Leva Patidars were Vaishyas.

Defendant No. 3 supported defendants Nos. 1 and 2 and claimed a share for herself on partition.

The Subordinate Judge held that the plaintiffs were the illegitimate sons of Bhiku Pandu; that Bhiku was a Sudra by caste and therefore allowed the plaintiffs  $\frac{3}{8}$ ths share in the plaint properties on the principle laid down in *Gangabai Peerappa v. Bandu*<sup>(1)</sup>. He further held that defendant No. 3 was not entitled to any share.

The defendants Nos. 1 and 2 appealed to the High Court.

*Jayakar* with *Amin* and *Desai*, *G. N. Thakor*, and *D. G. Dalvi*; for the appellants:—We submit, that, in effecting the partition, the lower Court has erred in not allowing a separate share for the mother, defendant No. 3. Even where, among Sudras, illegitimate sons claim partition with legitimate sons, the rule as to mother's share applies: *Sheo Dyal Tewaree v. Judoonath Tewaree*<sup>(2)</sup>; *Beti Kunwar v. Janki Kunwar*<sup>(3)</sup>; *Chellammal v. Ranganatham Pillai*<sup>(4)</sup>.

If the mother died after the suit was filed, her share would descend to her own son, defendant No. 1, and not pass on to the plaintiffs.

On the main question, we submit that the deceased Bhiku Pandu was a Dwija or a non-Sudra, belonging:

(1) (1915) 43 Bom. 369.

(2) (1868) 9 W. R. 61.

(3) (1910) 33 All. 118.

(4) (1910) 34 Mad. 277.

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to Vaishya group. He belonged to the Leva Kunbi caste who were otherwise known as "Pajni Kunbis." Pajne being a corruption of "Panch Janas" denoting the five families which originally migrated to Khandesh from Gujarat.

In determining the question whether a particular caste was Vaishya or Sudra, the decisive test would be to consider the historic origin and antecedents of that caste, and trace it from its original stock to its present state, and not confine our attention only to existing customs and practices as the lower Court has done: see *Chhoturya Run Murdun Syn v. Sahub Purhulad Syn*<sup>(1)</sup>; *Ambabai v. Govind*<sup>(2)</sup>.

With regard to the status of the Leva Kunbis of Khandesh, we submit, that they belong to the group of Leva Kunbis and Leva Patidars of Gujarat. They migrated towards Khandesh in the 11th century and onwards. The Leva Kunbis of Gujarat are Vaishyas and those of Khandesh have even now retained some traces of their origin as indicated by the evidence on record. We rely on the following references in support of this submission: *Census of India (1911)*, Vol. VII, Part I, pp. 278-9.

*Bombay Gazetteer*, Vol. I, Part I, p. 4.

*Bombay Gazetteer*, Vol. IX, Part I, p. 14 (Index), pp. 166, 491-2.

*Bombay Gazetteer*, Vol. XII, pp. 39, 62, 64.

Sherring's *Hindu Tribes and Customs*, Vol. II, p. 258.

Hunter's *History of the Indian People*, p. 59.

The Leva Kunbis of Khandesh conform to the customs of Dwija generally. They wear the sacred thread and possess gotras. In places of pilgrimage, they are treated as Vaishyas. It may be, that, owing to lapse

<sup>(1)</sup> (1857) 7 Moo. I. A. 18 at p. 52.

<sup>(2)</sup> (1898) 23 Bom. 257.

of time and effect of new environments and association with the local agricultural population of Khandesh, they might have dropped some of their old customs of Gujarat and adopted new ones like that of widow-marriage, Pat or divorce; but no Court has gone the length of holding that the mere abandonment of some old customs and adoption of new ones, however inconsistent with the original status of the community, amounts to a change of status from Dwija to Sudra. Such a test would be unsound and misleading in these modern days when customs and manners are fast changing.

The lower Court has wrongly applied the case of *Gopal Narhar Safray v. Hanmant Ganesh Safray*<sup>(1)</sup>. It refers only to the adoption of a daughter's or sister's son, and not to the customs of widow-marriage, Pat and divorce. It cannot be said that the prevalence of such adoptions is a sure and infallible test of the community being a Sudra. Similarly, widow-marriage, Pat and divorce do not exist in several communities belonging to the Dwija or higher castes, and it would be wrong to say that on account of the adoption of such practices in more recent times, these communities have abandoned the status of a Dwija for that of a Sudra.

The deceased Bhika was an agriculturist by profession and so are the bulk of the Leva Kunbi caste. It cannot be said that this profession is the badge of Sudras, as even Vaishyas are allowed to carry on agriculture, by ancient tenets and custom.

*S. S. Patkar*, for respondent No. 2 not called upon.

SHAH, J. :—The plaintiffs in this case claimed to be the illegitimate sons of one Bhiku and sued to recover by partition their 3/5ths share in the moveable and immoveable properties left by Bhiku. The defendant

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property, and it does not matter whether the sons are entitled to divide the property equally or unequally. In view of the fact that the mother is now dead, it is pointed out on behalf of the respondents that the point has no practical importance. There had been no actual division of the property at the time of her death: and the lower Court did not award any share to the mother. According to the decision in *Raoji Bhikaji v. Anant Laxman* <sup>(1)</sup> it is clear that the extent of the shares of the three illegitimate sons would be the same now. That point, therefore, does not help the appellants in any way.

The second question is whether the lower Court is right in its conclusion that the parties are Sudras. The evidence on this point has been fully discussed on behalf of the appellants; and in view of the facts found by the lower Court as to the customs obtaining in the community to which the parties belong, it is not necessary to examine the oral evidence in detail. It is found by the lower Court that the members of the community to which the parties belong "have no Vedic rites and Sanskaras prescribed for the twice-born classes among them; that they have not the chief Sanskara, *Munj*, which makes a man *Dwija*; that they wear the sacred thread only occasionally; that this occasional wearing also is probably of a recent growth; that they have all the customs which one should expect among the Sudras, viz., adoption of a daughter's son, and of a sister's son, divorce, Pat marriage, widow-remarriage and non-tonsure of the widows which are all badges of an inferior or unregenerate caste as observed by the High Court in I. L. R. 3 Bom., p. 273."

The fact that the members of this caste do not ordinarily wear any sacred thread and that all the rites

(1) (1918) 42 Bom. 535.

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which Dwijas may observe are not observed by them is indecisive. It may be said that many members of the Kshatriya and the Vaishya communities, to one of which the parties claim to belong, do not usually wear any sacred thread and that even they do not observe all the Brahminical rites. The manner in which the ceremonies are performed is also not very helpful in determining whether the parties are Sudras or not. But the finding as to certain customs obtaining among the Leva Kunbis of the place or the District to which the parties belong is far more important. The correctness of the finding is not questioned before us. The fact that the adoption of a daughter's son or a sister's son is prevalent in this community shows that parties are Sudras, for it is an established rule in this Presidency that the adoption of a sister's son or a daughter's son or a mother's sister's son is permissible, only among Sudras without any proof of a special custom in favour of such adoptions. It is not suggested that the practice is based upon any special custom in this case. It is possible, however, to suggest that such a practice is attributable to a special custom. That could not be said of the practice of divorce, Pat marriage, and widow-remarriage, which supports the conclusion of the lower Court. It is clear that the caste, in which these customs are proved to obtain, can reasonably and properly be treated as Sudras, and the inference of the lower Court based on these facts appears to me to be right.

The oral evidence adduced by the plaintiffs goes to show that the parties are Sudras. In fact one witness, who is an elderly man and a Bhauband of the deceased Bhiku, admits that he considers himself a Sudra. The evidence of the schoolmaster (Exhibit 103), which appears to be reliable, helps the plaintiffs' case.

The parties are Leva Kunbis residing at Changdev in the East Khandesh District. The evidence led on

behalf of the defendants does not appear to me to establish any fact of any real value which could afford a reasonable answer to the inference suggested by the evidence adduced on behalf of the plaintiffs. The important witnesses examined on behalf of the defendants are Leva Kunbis of other districts; and their evidence is not of much use. It is urged, however, that apart from the oral evidence historically the Leva Kunbis in the Khandesh District belong to the same stock as the Leva Kunbis of Gujarat, that they migrated from Gujarat some centuries ago, that they must be accorded the same status which the Leva Patidars occupy in Gujarat, and that the Leva Patidars in Gujarat are Kshatriyas or Vaishyas. Several passages from the Bombay Gazetteers, Vol. IX, Part I (Gujarat Population) and Vol. XII (Khandesh) have been cited to us to show the origin and history of the Leva Patidars in Gujarat and that the Leva Kunbis migrated to Khandesh some centuries ago. It is needless, in my opinion, to examine these passages in any detail, and to express any opinion as to the status of the Leva Patidars or Kunbis in Gujarat. Assuming for the sake of argument that the community to which the parties belong originally migrated from Gujarat several centuries ago and that the Leva Kunbis of Gujarat are not Sudras, it does not necessarily follow that they have retained in modern times the same customs and status as the Leva Kunbis in Gujarat may have retained. The recent history of the caste, as disclosed in the evidence, shows the adoption of customs, which are indicative of their present status as Sudras, and that, in my opinion, is sufficient for the purpose of this case. It is to be noted that the caste to which the parties belong and which used to be described originally as Kunbi caste has recently been described according to the evidence as Leva Kunbis; and it seems to me that an

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attempt has been made on behalf of the defendants to show, if possible, a higher status with a view to escape the liability in the present suit. The description of the caste "Pajne Kunbis," which was originally given to this caste, has apparently been changed to "Leva Kunbis" during the last twenty years. It seems to me on the evidence that the caste to which the parties belong are Sudras, whatever may have been the real status of the ancestors who migrated from Gujarat.

It is no doubt true that the test of occupation may be applied in determining the status of a particular caste. If that is applied in this case, it may be urged that the occupation of agriculture does not necessarily indicate that the parties are Sudras, as the occupation of agriculture is permissible to the Vaishya caste according to the ancient texts. But according to those texts agriculture as an occupation was permitted to the Sudras also. It is a matter of common knowledge that among cultivating classes there are many Sudras: and the fact that the Leva Kunbis are generally agriculturists is by itself not sufficient to establish that they are not or cannot be Sudras. The conclusion that the parties are Sudras is supported by the remarks in Steele's Law and Custom of Hindu Castes at pp. 100 and 101 relating to *kunbis*. I am satisfied that the conclusion reached by the lower Court that the parties in this case are Sudras is correct, and that the special rule laid down in the Mitakshara allowing illegitimate sons certain share in the property of their father must be applied to this case. I would, therefore, confirm the decree of the lower Court and dismiss the appeal with costs.

MACLEOD, C. J. :—I agree.

*Decree confirmed.*

J. G. R.